PD-1213-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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ORAL ARGUMENT REQUESTED

CAUSE NO. PD-1213-20

RECEIVED
COURT OF CRIMINAL APPEALS
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IN THE

TEXAS COURT OF CRIMINAL APPEALS

AT AUSTIN

THE STATE OF TEXAS, Petitioner,

VS.

BOBBY CARL LENNOX A/K/A BOBBY CARL LEANOX, Respondent.

ON PETITION FOR REVIEW FROM THE SIXTH JUDICIAL DISTRICT COURT OF APPEALS AT TEXARKANA; CAUSE NO. 06-19-00164-CR; FROM THE SIXTH JUDICIAL DISTRICT COURT OF LAMAR COUNTY; TRIAL CAUSE NO. 28256; HONORABLE R. WESLEY TIDWELL, JUDGE

THE STATE OF TEXAS' REPLY BRIEF ON THE MERITS

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ATTORNEYS FOR THE STATE OF TEXAS

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 38.1(a), the list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel, is not needed to correct or amend Bobby Carl Lennox (Lennox's) list because it was not included in his brief.

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STATEMENT OF THE CASE

From its April 12th brief on the merits, the State of Texas (the State) hereby incorporates the "Statement of the Case," as if fully copied and set forth verbatim.

Unlike the companion case (PD-1182-20) in *Green*, the defendant (Lennox) did not move the trial court to quash the State's three-count indictment (CR, pgs. 6-8), which alleged the felony offense of forgery of a financial instrument as a habitual offender. *See* CR, pg. 6; TEX. PENAL CODE ANN. §§ 32.21, 12.42 (West Supp. 2020).

Further, the defendant (Lennox) never took advantage of the amended statute by raising section 32.21(e-1) at any point in time during his jury trial.

STATEMENT REGARDING ORAL ARGUMENT

The State of Texas (the State) requests oral argument, after this Court heard oral argument on May 19, 2021 in the companion case of *The State of Texas v. Trenton Kyle Green*, No. PD-1182-20 in the Texas Court of Criminal Appeals at Austin. https://www.youtube.com/watch?v=__8bZYDmX_k

Given the May 19th presentation, oral argument would significantly aid this Court's decisional process by further addressing the May 19th questions from individual justices and by elaborating or differentiating the present case from the companion *Green* case, including the respective arguments.

ISSUE(S)/GROUND(S) PRESENTED

SOLE GROUND PRESENTED: FROM THE APPELLATE COURT'S STATUTORY CONSTRUCTION OF SECTION 32.21(e-1) OF THE TEXAS PENAL CODE, THERE WAS NO JURY CHARGE ERROR; BUT IN RESOLVING THE JURISDICTIONAL CONFLICT HEREIN, THE STATE OF TEXAS CORRECTLY CHARGES THE FELONY OFFENSE OF FORGERY UNDER SECTION 32.21 OF THE PENAL CODE, WHEN THE INDICTMENT ALLEGES THAT ANY DEFENDANT FORGES A WRITING WITH THE INTENT TO HARM OR DEFRAUD ANOTHER; THE WRITING IS THE ESSENTIAL ELEMENT OF THE OFFENSE, AND THE VALUE LADDER IN SUBSECTION (E-1), AS AMENDED IN 2017, WAS NOT AN ELEMENT OF THE OFFENSE, BUT A PUNISHMENT ISSUE.

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THE STATE OF TEXAS' REPLY BRIEF ON THE MERITS

TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:

COMES NOW, the State of Texas ("the State"), by and through the elected county and district attorney of Lamar County, Gary D. Young, and the Lamar County and District Attorney's Office, and Jeffrey W. Shell, an *attorney pro tem*, respectfully submits this Reply Brief under Rule 70.3, Rule 38.3 and Rule 38.6(c) of the Texas Rules of Appellate Procedure.

STATEMENT OF FACTS

From its April 12th brief on the merits, the State hereby incorporates the "Statement of Facts," as if fully copied and set forth verbatim.

SUMMARY OF THE ARGUMENT (IN REPLY)

In summary, the present case is different from the companion *Green* case because, here, the State advanced a statutory interpretation that was different from the discretion-to-indict interpretation in the *Green* case. Thus, by way of reply, the State will not address Lennox's arguments regarding due process/course of law concerns, if any; the vagueness issue and leading to unjust results. *See* Lennox's Brief on the Merits, pgs. 15-18.

Rather, the "writing" in section 32.21(b) was, and continues to be, the "essential" element of the offense, and the "value ladder" in subsection (e-1) was not a "purpose-element," for several reasons: (1) the 2017 legislative changes did not include the words, "Subject to," in subsections (b), or (c); (2) the 2017 legislative changes did not change the definition of "writing"; and (3) the words, "subject to," have a different definition than the one advanced by Lennox in his brief (*see* Lennox's Brief on the Merits, pg. 14), and the definition adopted by the court of appeals in *Green*. *See State v. Green*, 613 S.W.3d 571, 582 (Tex. App.—Texarkana 2020, pet. granted).

Finally, subsection (e-1) was not intended to be a lesser-included offense because the legislature did not include language to that effect. Because subsection (e-1) was not intended to be a lesser-included offense to be shown at the guilt-innocence phase, subsection (e-1) is, and should be, a punishment issue.

ARGUMENT AND AUTHORITIES

A. **Introduction.**

In his May 13th brief, Lennox misstated the State's argument from its April 12th opening brief, where he alleged that "the State has discretion to indict under subsection (b) or subjection (e-1), ignores the language in the provision, causes due process/due course of law concerns, raises a vagueness issue, and leads to unjust results." *See* Lennox's Brief on the Merits, pg. 11; *see also* pg. 13 ("the State can simply choose to charge such an offense as either a State jail felony under subsection (b), or as one of the offenses listed under (e-1)."). But, that discretion-to-indict interpretation was taken by the State in the companion *Green* case.

In the present case, the State advanced a different interpretation of the 2017 legislative amendments to section 32.21 of the Texas Penal Code. Therefore, the State will not address Lennox's arguments regarding due process/course of law concerns, if any; the vagueness issue and leading to unjust results (*see* Lennox's Brief on the Merits, pgs. 15-18) because, here, the State did not advance the discretion-to-indict interpretation in its April 12th opening brief.

Rather, the State advanced the interpretation here that the "writing" in section 32.21(b) was, and continues to be, the "essential" element of the offense, and the "value ladder" in subsection (e-1) was not a "purpose-element." Subsection (e-1) was a punishment issue under the rationale of *Oliva v. State*, 548 S.W.3d 518 (Tex. Crim. App. 2018) and for an additional reason, as explained below. By advancing a different interpretation here, section 32.21 of the Texas Penal Code, as amended, is ambiguous because "it may be understood by reasonably well-informed persons to have two or more different interpretations." *See, e.g., Watkins v. State*, 619 S.W.3d 265 (Tex. Crim. App. 2021).

B. **The 2017 Legislative Amendments Did Not Reflect an "Express" Intent.**

In his brief, Lennox contended that the forgery offense was expressly "subject to" specific value amounts, including the purpose for the action, contained in subsection (e-1). *See* Lennox's Brief on the Merits, pg. 13. But, the 2017 legislative amendments to section 32.21 did not reflect such an "express" intent for several reasons.

First, the 2017 legislative amendments did not include the words, "Subject to Subsection (e-1)" in subsection (b), or (c). *See* TEX. PENAL CODE ANN. § 32.21(b)-(c) (West Supp. 2020). Without any amendment or change in 2017, subsection (b) defined the offense with the words, "A person commits an offense if he forges a writing with intent to defraud or harm another." *See id*. As worded, the offense was

complete when a person committed the act of forging a writing (or writings) with intent to defraud or harm another.

Second, the 2017 legislature did not amend section 32.21 to change the definition of "writing" under subsection (a)(2). *See* TEX. PENAL CODE ANN. § 32.21(a)(2) (West Supp. 2020).

Finally, the legislature used the words, "subject to," without any definition and used words that were absent from the Texas Government Code. In his brief, Lennox alleged that the State's interpretation ignored the "subject to" language, and that "[t]his means that subsections (d) and (e) are subservient to, limited by, subsection (e-1." *See* Lennox's Brief on the Merits, pg. 14.

But, again, one Texas appellate court interpreted the phrase "subject to" to mean "not in conflict with." *See State ex rel. White v. Bradley*, 956 S.W.2d 725, 738-39 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 990 S.W.3d 245 (Tex. 1999). That definition of "not in conflict with" was inapposite to "subservient to" and "limited to." *See* Lennox's Brief on the Merits, pg. 14.

For any of the reasons above, subsection (b) was not expressly "subject to" subsection (e-1). Therefore, the court of appeals erred in concluding otherwise.

C. **Subsection (e-1) Was Not Intended to be a Lesser-Included Offense.**

Further, subsection (e-1) was not intended to be a lesser-included offense of forgery because the 2017 legislative amendments did not include language, which is

similar to that found in subsection 32.41(g) of the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 32.41(g) (West 2018) ("An offense under this section is not a lesser included offense of an offense under Section 31.03 or 31.04."). When amending section 32.21, the 2017 legislature could have included similar language, but did not.

Because the legislature did not, subsection (e-1) was not intended to be a lesser-included offense that could be shown on the trial of an offense during the guilt-innocence phase. Because subsection (e-1) was not intended to be a lesser-included offense, that subsection is, and must be, a punishment issue.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays that upon final submission after June 30th oral argument, this Court reverse the judgment of the court of appeals and reinstate the trial court's final judgments of conviction as to the three (3) counts; adjudge court costs against the appellant; or, in the alternative, reverse the judgment of the court of appeals and remand for a new trial; and for such other and further relief, both at law and in equity, to which the State may be justly and legally entitled.

Respectfully submitted,

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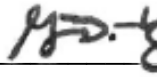
By: 
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, "The State of Texas' Reply Brief on the Merits" was a computer-generated document and contained 2671 words—not including the Appendix, if any. The undersigned attorney certified that she relied on the work count of the computer program, which was used to prepare this document.

Gary D. Young

CERTIFICATE OF SERVICE

This is to certify that, in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure, a true copy of "The State of Texas' Reply Brief on the Merits" has been served by e-filing on the 1st day of June, 2021 upon the following:

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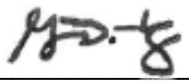

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